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No. 94-321

In The

Supreme Court of the United States

October Term, 1994

JOHN J. KOZELKA
Petitioner

v.

JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, I BRUTE ENTERPRISES INCORPORATED, CONTEMPORARY BOOKS INCORPORATED
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondents, in their Brief in Opposition, disparage the propriety of granting certiorari by misapplying the principles applicable to ordinary bias, ignoring the fact that pro se bias is fundamentally different, which negates the use of normal bias procedures. Respondents exploit the justifiable dismissal of six of Petitioner's claims, to obscure the fact that three solidly based counts of Petitioner's Complaint were dismissed on sham and frivolous grounds contrary to all principles of law, equity and human sensibility. In a further attempt to oppose the granting of certiorari, Respondents highlight a facade of justice enacted by the District Court, wherein rulings favorable to Petitioner were entered in numerous trivial matters which could later be rendered moot by ultimate action on the critical issues. Finally, Respondents im-

ply that certiorari is barred in the foregoing case by distorting Supreme Court Rule 10.1, adding their own interpretation to segments of the Rule taken out of context.

I. PETITIONER'S FAILURE TO RAISE THE BIAS ISSUE IN THE LOWER COURTS SUPPORTS THE GRANTING OF CERTIORARI.

A. THE BIAS ISSUE WAS NOT RAISED BECAUSE THE LOWER COURTS HAVE NO PROCEDURE APPLICABLE TO THE PRO SE BIAS PROBLEM.

1. The implication raised by Respondents that Petitioner should have moved for recusal relative to the allegation of pro se bias is frivolous to the point of incoherence (Brief in Opposition, p. 5, ¶3). As previously set forth and explained by Petitioner, recusal procedures are useless in cases of pro se prejudice since the factors producing the bias are identically present in each and every judge [Petition, Section I(B), ¶¶4, 11, pp. 12, 19].

B. THE PRO SE BIAS ALLEGED BY PETITIONER WAS NOT FULLY APPARENT AS AN INDISPUTABLE FACT PRIOR TO THE RULING OF THE SECOND CIRCUIT COURT OF APPEALS.

1. The Cases of *FTC v. Grolier, Miree v. DeKalb County* and *Rogers v. Lodge* were incorrectly applied by Respondents in the foregoing instance. These cases involve the raising of issues concerning facts and circumstances which had fully transpired and were fully apparent at the district and circuit appellate court levels. In the foregoing case, the facts giving rise to the allegation of pervasive bias had not fully transpired prior to the biased ruling of the court of appeals in the instant matter. This Court has considered and does consider issues not raised in the courts below in cases where exceptional circumstances are present. *Lawn v. United States* (1958), 355 U.S. 339, 362-363, n. 16; *United Brotherhood of Carpenters v. United States* (1947), 330 U.S. 395, 412; *West v.*

Rutledge Timber Co. (1917), 244 U.S. 90, 99-100; *United States v. Tennessee & Coosa Railroad Co.* (1900), 176 U.S. 242, 256; *Duignan v. United States* (1927), 274 U.S. 195, 200.

2. The action of a single judge is insufficient grounds for an allegation of pervasive bias. The accusation of a universal policy of bias can only be substantiated by evidence accrued from a multiplicity of judges and court systems. This precludes possibility that the instant bias issue could have been properly raised prior to judgement by the Court of Appeals.

C. RESPECT FOR THE JUDICIARY DEMANDED WITHHOLDING THE ALLEGATION OF PRO SE BIAS PENDING ABUNDANT ACCUMULATION OF EVIDENCE.

1. The respect which every citizen owes the authorities of this nation dictates that a person err in the direction of restraint, if necessary, to avoid possibly defaming our judicial body by erroneous allegations. The utmost in restraint and caution was desirable before raising the pro se bias issue since this allegation, alleging a pervasive policy of bias, can easily be misconstrued as attacking the integrity of the entire legal system.

II. RESPONDENTS' NEGATION OF DEPARTURE FROM ACCEPTED PROCEEDINGS IS A BALD ASSERTION DEVOID OF ANY SUPPORTING FACTS, ARGUMENT OR AUTHORITY.

1. Six of Petitioner's claims (Counts I, IV, VI, VII, VIII and IX) were dismissed with "cogent, proper explanations" having a "solid foundation in legal precedent" and with accurately applied "citations to supporting legal authority." This action was used as a screen to camouflage the dismissal of three solidly based causes of action (Counts II, III, and V) using "explanations" devoid of any legal precedent, supporting authority or coherent reasoning (App. Pet. 6A, ¶4; 7A, ¶ 1; 9A, ¶1; 10A, ¶¶1-3; 11A, ¶¶1-2).

2. The District Court's repudiation of the outrageousness of Respondents' actions and of the foreseeability of Petitioner's injuries were assertions of personal opinion contrary to normal human sensibilities and in defiance of expert testimony supporting the opposite conclusion [Petition, Section II(D), ¶¶1-2, pp. 24-25].

3. The District Court's denial of the existence of acts taken in reliance on fraud, in contradiction to Petitioner's clear allegation that such acts were taken, can be logically interpreted only as a judgement against the truthfulness of Petitioner's assertions. [Petition, Section II(D), ¶3, p.25].

4. The District Court's "libel claim" argument, used to dismiss count V of Petitioner's Complaint, defies all principles of law, equity and reason. [Petition, Sections II(A), II(B) and II(C), pp.21-24].

5. The District Court's rulings on outrage, foreseeability and acts in reliance on fraud effectively usurp the role of jury in violation of Article VII of the Amendments to the United States Constitution (App. Pet. 14A).

6. Although Respondents repeatedly proclaim that the

District Court's rulings were well founded in law and supported by valid argument, it is Petitioner who cites authority and gives argument refuting the District Court's action [Petition, Sections II(A), II(B) II(C) and II(D), pp. 21-25]. Respondents neither cite authority nor attempt any argument by way of rebuttal in support of the District Court.

III. GRANTING PETITIONER "EVERY OPPORTUNITY TO PRESENT HIS CASE" WAS MERELY A DECEPTIVE MANEUVER, INTENDED TO EFFECT AN ILLUSION OF JUSTICE.

1. The truth that Petitioner was given "every opportunity to present his case" is immaterial to the fact that, after presenting his case, his action was dismissed without any proper grounds using sham, specious or utterly incoherent arguments. Granting Petitioner the unlimited right to amend and supplement his Complaint and to file supporting exhibits and affidavits was rendered moot by dismissing three solidly based claims with arguments which, if valid, could support dismissal of any claim ever stated for fraud, negligence or infliction of mental distress [Petition, Sections II(A), II(B), II(C) and II(D), pp. 21-25].

2. There is no indication whatsoever, other than words stated by the District Court, that any additional materials submitted and filed by Petitioner were "considered" relative to ruling on Respondents' Motion to Dismiss (App. Pet. 8A, ¶1; 11A, ¶4; 12A, ¶¶1-3). The least consideration given to the Affidavit of Frank Gancarz as expert testimony would have established the outrage and foreseeability questions to be jury matters and would have barred the complete dismissal of Petitioner's Complaint [Petition, Section II(D), ¶¶1-2, pp.24-25]. Furthermore, the least consideration given to Respondents' steroid instruction guide and to Petitioner's letters written to Respondents, also filed and accepted as exhibits, would have had the same result relative to outrage and foreseeability and barred complete dismissal of Petitioner's case (Petition, Section IV, pp. 27-28; App. Pet. 17A-24A; Appx.

19A-37A).

IV. THE CRITERIA FOR GRANTING CERTIORARI SET FORTH IN SUPREME COURT RULE 10.1 ARE BY NO MEANS ALL INCLUSIVE.

1. Rule 10.1 read in its entirety emphasizes the nonspecific criterion of "special and important reasons" as the governing factor for granting certiorari. The specific criteria listed in Sections a, b and c are stated as merely "indicat[e](ing) the character of reasons" that could justify granting the writ. The broad range and nonspecific nature of the criteria are further emphasized by the assertion that the specifically stated reasons are "neither controlling nor fully measuring (of) the Court's discretion." Respondents omit this information attempting to distort the statement of the Rule as giving exclusive and controlling criteria which would bar the granting of certiorari in the instant case.

2. The following facts combine to produce a "special and important reason[s]" for granting certiorari in the foregoing action:

a. Precedents set by this Court showing an inclination to examine cases of apparent pro se bias and reverse the biased rulings constitute the only effective means for rectifying the pro se problem.

b. The present situation of entrenched pro se bias deprives thousands of persons on a daily basis of all their legal rights, of their property and of their finances, and wastes the time and resources of all entities involved in pro se proceedings.

3. The central role in the foregoing case of the issue involving First Amendment publication rights, combined with the conflict and confusion in the courts and the need for precedents of this Court regarding this issue, is certainly of the same "character" as the reasons for granting certiorari listed

in Sections a and c of Supreme Court Rule 10.1 (Petition, Section III, pp.25-27).

4. The involvement of First Amendment rights in the issues of this case, as well as the denial of Constitutional rights caused by the practice of pro se bias, render the case to be "of the character for which certiorari is generally granted", based on the fact of Constitutional involvement alone [Petition, Section I(A), ¶¶1-3, pp. 8-9; Section III, pp.25-27].

> "As the final arbiter of law, the (Supreme) Court. . . . functions as guardian and interpreter of the Constitution."

The Supreme Court of the United States, The Court and Constitutional Interpretation, p.5.

A. THE PRACTICE OF PRO SE BIAS IS UNIVERSALLY KNOWN AND HAS HARMED PUBLIC FAITH IN THE COURT SYSTEMS TO THE POINT WHERE NEED FOR REMEDIAL ACTION IS URGENT.

1. The bias issue itself is divided into the question of actual bias and the direct harm caused by biased rulings, and the separate question of the appearance of bias and the harm inflicted on public faith in the judiciary. Likewise, the issue of harm done to public confidence in the court system divides into two separate factors: (1) the harm which can or will result if remedial action is not taken and (2) the damage already inflicted and present as an existing fact.

2. Any poll taken on the confidence held by the average citizen that a pro se litigant standing next to an opposing attorney will receive equal treatment by the court would reveal a majority opinion lacking faith in the legal system. Thus, the immediate need relative to the appearance and public confidence side of the pro se bias problem is not to preserve or protect an existing faith in the courts. It is an urgent necessity to rebuild the already shattered image of "equal justice under law" in pro se situations.

B. RESPONDENTS' PROMOTION OF SUICIDAL DRUG ABUSE INFLICTING DEATH OR BODILY DAMAGE ON BOTH CHILDREN AND ADULTS IS A "SPECIAL AND IMPORTANT REASON" FOR THE ATTENTION OF THIS COURT.

1. The death dealing and morally corrupt nature of Respondents' abuse of their freedom to publish is shown by consideration of the following facts admitted by Respondents within their magazines and books:

a. That all bodybuilding results portrayed by Respondents, all training programs described by them and all contests promoted and advertised within Respondents' publications are totally dependent upon steroid abuse (App. Pet.18A, ¶¶1-3; 20A, ¶4; 21A, ¶¶4-5).

b. That the steroid dosages needed to produce the results advertised by Respondents are between seven (7) and sixteen (16) times the dosage which a reputable physician would prescribe and administer legally. (See App. Pet. 23A, ¶2. Compare steroid dosage of 100 milligrams per day [700 milligrams per week] recommended in steroid program outlined in Competitive Bodybuilding with maximum recommended dosages of anabolic steroids Winstrol [Stanozolol - 6 milligrams per day] and Durabolin [Nandrolone Phenpropionate - 100 milligrams per week] given in pharmaceutical manual Facts and Comparisons [App. Pet. 26A-27A]. Note Illustrations of drugs Winstrol and Durabolin portrayed in Competitive Bodybuilding [App. Pet. 17A].)

c. That numerous teenagers and children are drawn into steroid use by viewing Respondents' publications (App. Pet. 33A, ¶1).

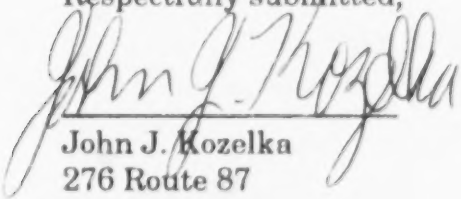
d. That the steroid use promoted, encouraged and instigated by Respondents results in widespread bodily damage and death (App. Pet. 20A, ¶3; 22A, ¶2; 24A, ¶3; 28A, ¶2; 29A, ¶¶4-7; 30A, ¶2; 31A, ¶¶5-6; 33A, ¶¶2-3; 34A, ¶1).

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, Petitioner respectfully requests that a writ of certiorari be issued to review the order and judgement of the United States Court of Appeals for the Second Circuit relative to the above-entitled action, that the Questions Presented be decided by this Court, and that the foregoing case be remanded to the District Court for trial.

Dated this 4th day of October, 1994.

Respectfully submitted,



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